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Nos. 04-1507 & 04-1508

In The
Supreme Court of the United States

JUDITH MILLER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

MATTHEW COOPER and TIME INC., *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

REID ALAN COX*
RENEE L. GIACHINO
CENTER FOR INDIVIDUAL FREEDOM
113 S. Columbus Street, Suite 310
Alexandria, VA 22314
(703) 535-5836

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Freedom (the "Center") is a non-partisan, non-profit organization with the mission to

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[1] This brief is filed with the written consent of both parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

protect and defend individual freedoms and individual rights guaranteed by the Constitution of the United States, including free speech rights, free press rights, privacy rights, and the freedom of association. Of particular importance to the Center in these cases is the need to vigilantly safeguard the First Amendment rights of all newsgatherers, publishers, and the public, who depend on the protection of confidential sources in gathering, publishing, and receiving news, information, and commentary.

The Center's interest in these cases stems not only from its principled commitment to protect and defend the constitutional rights of all newsgatherers, publishers, and the public, but also from the Center's practical experience as a newsgatherer, information source, and publisher, itself. As a vocal proponent of individual freedom, open government, and public accountability, the Center engages in direct-to-the-public advocacy by disseminating news, information, and commentary through a variety of media, including its own Internet website, <http://www.cfif.org>, which is updated weekly and visited by millions of readers each year. The Center's advocacy is dependent upon an ability to gather information from all types of sources, including those who require their identities remain confidential, so that the Center is able to enlarge public knowledge and encourage public discourse on matters of importance.

SUMMARY OF ARGUMENT

It is long past time for this Court — the final arbiter of the Constitution of the United States — to reconsider and clarify whether and when the First Amendment protects newsgatherers from compelled disclosure of their confidential news sources pursuant to legal proceedings. These constitutional questions of the utmost importance have confounded and divided the federal circuit courts, federal district courts, and state courts of record for more than three

decades. Indeed, given the multiplicity of conflicting rulings, newsgatherers now find they enjoy dramatically different First Amendment protections for their confidential news sources from one jurisdiction to the next, from one type of case to another, and even from federal to state courts. This arbitrary jurisprudential patchwork not only threatens the constitutional rights of newsgatherers, their confidential sources, and the public by chilling important protected speech, it also undermines the First Amendment, itself, which is supposed to be the "supreme Law of the Land" in each legal proceeding in every court across the country. Moreover, in the generations since this Court considered these constitutional questions, there has been a sea change in the protection of confidential news sources and truthful information that indicates a national consensus among the states in favor of a reporter's privilege that shields newsgatherers like the Petitioners in these cases.

Additionally, these cases warrant review because the court below upheld the contempt citations against and the imprisonment of the journalists based, at least in part, on secret evidence submitted by the prosecutor and considered by the court *ex parte*. That ruling directly conflicts with the overwhelming weight of authority from this Court and others. Indeed, even in cases that involve far more compelling and certain concerns, this Court has consistently held that, at a minimum, due process requires the opportunity to review and rebut the evidence presented before an accused can be "deprived of life, liberty, or property."

ARGUMENT

I. THIS COURT SHOULD CLARIFY WHETHER AND WHEN THE FIRST AMENDMENT PROTECTS CONFIDENTIAL NEWS SOURCES FROM COMPELLED DISCLOSURE IN LEGAL PROCEEDINGS

It is always important to "start with first principles." *United States v. Lopez*, 514 U.S. 549, 552 (1995). With respect to the freedoms of speech and of the press guaranteed by the First Amendment, this means that governmental actions that interfere with the communication of truthful information and even controversial ideas raise constitutional concerns and are inherently suspect. *See generally Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). The U.S. Supreme Court has noted that even when the government's authority is at its zenith, such as when the government is protecting and vindicating civil society's standards through a criminal prosecution, adverse impacts on the First Amendment rights of others cannot be disregarded or ignored. *See generally Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Instead, those constitutional concerns must be taken into account when courts review the challenged state action by properly weighing the First Amendment interests at stake as an important counterbalance to the interests asserted against openness and the public's right to receive information and ideas. *See generally Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Landmark Communications, Inc.*, 435 U.S. 829.

These "first principles" lead to the conclusion that constitutional protections for free speech and free press, in one way or another, limit the authority of special counsel, prosecutors, criminal defendants, and civil litigants to compel newsgatherers and publishers to disclose confidential sources used in gathering and communicating news, information, and commentary to the public. The court below, however,

rejected this conclusion because the majority believed that this Court, in *Branzburg v. Hayes*, 408 U.S. 665 (1972), "considered and rejected the same claim of First Amendment privilege on facts materially indistinguishable from those at bar." *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964, 968 (D.C. Cir. Feb. 15, 2005). Because that decision is in direct conflict with the rulings of other federal circuit courts, federal district courts, and state courts of record, not to mention a clear national consensus among the states in favor of a reporter's privilege protecting confidential news sources, this Court should grant review in these cases.

A. This Court Should Resolve the Conflicts and Confusion Over the Meaning and Application of *Branzburg*

It is definitely time for this Court to reconsider and clarify the meaning and application of *Branzburg v. Hayes*, 408 U.S. 665 (1972). As with *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), which this Court reconsidered and clarified two terms ago in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), the *Branzburg* decision has created irreconcilable conflicts and undeniable confusion in the courts below. Today, there are no fewer than four different and inconsistent positions taken by the federal circuit courts that have interpreted *Branzburg* and decided whether and when the First Amendment provides a privilege protecting confidential news sources.[2]

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[2] Indeed, there could be more inconsistent positions on the interpretation of *Branzburg* yet to come since two circuits — the Eighth and Tenth — have yet to address whether the First Amendment offers any protection for confidential news sources in criminal proceedings. *See Cervantes v. Time Inc.*, 464 F.2d 986, 992 n.9 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977).

First, there are four circuits — the First, Second, Third, and Eleventh — that have held *Branzburg* recognized a First Amendment privilege protecting newsgatherers from the compelled disclosure of their confidential sources in all types of cases, both civil and criminal, including grand jury proceedings. *See, e.g., In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 813 (1983) (citing *Baker v. F & F Inv.*, 470 F.2d 778, 784 (2d Cir. 1972)); *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 36 (2d Cir. 1999);[3] *Riley v. City of Chester*, 612 F.2d 708, 714-15 (3d Cir. 1979); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *In re Grand Jury Subpoena* (*Williams*), 766 F. Supp. 358, 371 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (*en banc*); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986), *cert. denied*, 482 U.S. 917 (1987), 483 U.S. 1021 (1987).

These are the circuits that most directly conflict with the decision of the court below.[4] *Compare In re Grand Jury Subpoena* (*Miller*), 397 F.3d at 970 ("Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing

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[3] In *Gonzales v. National Broadcasting Co.*, the Second Circuit noted that "[p]revious decisions of our court have expressed differing views on whether the journalists' privilege is constitutionally required, or rooted in federal common law," explaining that, "[u]ntil Congress legislates to modify the privilege or do away with it, . . . we need not decide whether the privilege is founded in the Constitution." 194 F.3d 29, 36 n.6 (2d Cir. 1999).

[4] This is not to mention the state courts of last resort that, likewise, have concluded that *Branzburg* and the First Amendment stand for the proposition that newsgatherers enjoy a privilege protecting their confidential sources from compelled disclosure pursuant to grand jury proceedings. *See Cooper & Time Inc. v. United States*, No. 04-1508, Pet. for Writ of Cert., at 21-22 & n.6 (citing cases) (filed May 10, 2005).

before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source."), *with In re Grand Jury Subpoena of Williams*, 766 F. Supp. at 371 ("There is a qualified news gatherer's privilege against compelled disclosure of his or her news sources in a Grand Jury proceeding."), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (*en banc*).

Second, there is the interesting position of the Ninth Circuit, which has concluded that the First Amendment provides newgatherers with a privilege for the protection of their confidential sources in civil and criminal cases, but not grand jury proceedings. *See, e.g., Shoen v. Shoen*, 5 F.3d 1289, 1296 (9th Cir. 1993) (recognizing the reporter's privilege in a civil case); *Farr v. Pitchess*, 522 F.2d 464, 467-69 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (applying the reporter's privilege in a criminal case); *In re Grand Jury Proceedings* (*Scarce v. United States*), 5 F.3d 397, 402 (9th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994) (rejecting the reporter's privilege in the context of a grand jury).

Third, three other circuits — the Fourth, Fifth, and the court below, the D.C. Circuit — have recognized a First Amendment-based reporter's privilege in civil cases while, at the same time, concluding that *Branzburg* eliminated the possibility of such protection in criminal cases. *Compare In re Shain*, 978 F.2d 850, 852-53 (4th Cir. 1992); *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998); and *In re Grand Jury Subpoena* (*Miller*), 397 F.3d 964, 970 (D.C. Cir. Feb. 15, 2005) (all rejecting a reporter's privilege in criminal proceedings); *with LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); and *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) (all recognizing a reporter's privilege in civil cases).

Fourth and finally, there are the Sixth and Seventh Circuits, which have ruled that, in *Branzburg*, this Court rejected altogether a First-Amendment based privilege for newsgatherers and the protection of their confidential sources regardless of the type of legal proceeding in which the disclosure is sought. *See, e.g., In re Grand Jury Proceedings* (*Storer Communications, Inc. v. Giovan*), 810 F.2d 580, 584 (6th Cir. 1987); *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

It is evident why *Branzburg* and a First Amendment privilege protecting confidential news sources have so confused and divided the courts below. As was the case in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the meaning and application of *Branzburg* depends upon the necessary fifth vote of Justice Powell.

It is true that, unlike in *Bakke*, Justice Powell joined the majority opinion in *Branzburg*. But not only is that five-vote majority opinion far from clear in foreclosing future assertions of a First Amendment-based newsgathering privilege, *see Branzburg*, 408 U.S. at 707 ("news gathering is not without its First Amendment protections"), Justice Powell also issued a concurring opinion specifically stating that *Branzburg* "does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources," *id.* at 709 (Powell, J., concurring), and that "the courts will be available to newsmen under the circumstances where legitimate First Amendment interests require protection," *id.* at 710 (Powell, J., concurring).

Indeed, Justice Powell noted in his concurring opinion that if a newsgatherer has some "reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered." *Id.* Justice Powell then

went on to explain that, in his opinion, "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct," and that such a "balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." *Id.* In other words, Justice Powell explicitly held that the First Amendment applied and offered at least some protection when newsgatherers face the compelled disclosure of their confidential sources in connection with legal proceedings.

The necessity of Justice Powell's vote and his concurring opinion's effect on the holding in *Branzburg* are the obvious reasons why the courts below are so hopelessly conflicted and confused. No fewer than eight of the federal circuits — including the court below in *Zerilli*, 656 F.2d at 711, and *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974) — have held, at one time or the other, that Justice Powell's concurrence controls or narrows the holding in *Branzburg*. *See also Miller v. United States*, No. 04-1507, Pet. for Writ of Cert., at 17-18 (collecting cases). Strikingly, even Judge Posner, who rejected the recognition of a reporter's privilege under the First Amendment for the Seventh Circuit, noted that he was unsure whether his reading of *Branzburg* was correct:

> Although the Supreme Court in *Branzburg* . . . declined to recognize such a privilege, Justice Powell, whose vote was essential to the 5-4 decision rejecting the claim of privilege, stated in a concurring opinion that such a claim should be decided on a case-by-case basis by balancing the freedom of the press against the obligation to assist in criminal proceedings. Since the dissenting Justices would have gone further than Justice Powell in recognition of the reporter's privilege, and preferred his position to that of the

> majority opinion (for they said that his "enigmatic concurring opinion gives some hope of a more flexible view in the future"), maybe his opinion should be taken to state the view of the majority of the Justices — though this is uncertain, because Justice Powell purported to join Justice White's "majority" opinion.

McKevitt, 339 F.3d at 531-32 (citations omitted).

Moreover, the confusion as to meaning and application of *Branzburg* has only been exacerbated by the fact that this Court has explained in the past that its holdings are controlled by and should be understood to be those that can or did receive the assent of at least five justices. *See McKoy v. North Carolina*, 494 U.S. 433, 462 n.3 (1990) (Scalia, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting) (a concurrence "can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation adopted by a necessary member of that majority); *cf. Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'").

There can be little doubt that Justice Powell intended to control or, at the very least, narrow the holding in *Branzburg*. Explaining his necessary fifth vote several years later, Justice Powell wrote:

> The concurring opinion in *Branzburg v. Hayes* . . . noted . . . that in considering a motion to quash a subpoena directed to a newsman, the court should balance the competing values of a free press and the societal interest in detecting and prosecuting crime. . . . Rather than advocating the creation of a special procedural exception for the press, it approved

> recognition of First Amendment concerns within the applicable procedure.

Zurcher v. Stanford Daily, 436 U.S. 547, 570 n.3 (1978) (Powell, J., concurring).

Thus, even in spite of *Branzburg*'s result, perhaps the most plausible reading of that decision is that this Court held the First Amendment provides newsgatherers and publishers with some degree of constitutional protection against the compelled disclosure of their confidential source, even when subpoenaed by a grand jury. *See Branzburg*, 408 U.S. at 709-10 (Powell, J. concurring); *id.* at 712-13, 721-22 (Douglas, J., dissenting); *id.* at 736-38, 743 (Stewart, Brennan, Marshall, JJ., dissenting). Or perhaps, as Justice Stewart commented in a law journal article, *Branzburg* was a stalemate in which this "Court rejected the [reporters'] claims . . . by a vote of four and a half to four and a half." Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 635 (1975).

In either case, it goes almost without saying that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and the current arbitrary patchwork of varied First Amendment protections for confidential news sources surely does not adequately secure the freedoms of speech and of the press. Indeed, both Petitioner Judith Miller and Respondent Special Counsel Patrick Fitzgerald know well that newsgatherers enjoy widely differing constitutional protections for their confidential sources depending solely upon the jurisdiction in which their discovery is sought. *Compare In re Grand Jury Subpoena (Miller)*, 397 F.3d at 970 (upholding a contempt citation against Ms. Miller because "the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence

promised by the reporter to any source"); *with New York Times v. Gonzales*, No. 04 Civ. 7677 (RWS), 2005 U.S. Dist. LEXIS 2642 (S.D.N.Y. Feb. 24, 2005) (recognizing a reporter's privilege under the First Amendment and common law that protects Ms. Miller's confidential sources and telephone records). Such arbitrary First Amendment protection is not constitutionally acceptable, and this Court should grant review to resolve these conflicts.

B. The Foundations Underlying *Branzburg* Have Shifted and a Consensus Among the States Now Favors Protection for Confidential News Sources

Although the federal circuit courts are much conflicted as to whether and when newsgatherers enjoy a constitutional privilege protecting their confidential sources from compelled disclosure in legal proceedings, the states are unanimous in embracing some sort of reporter's privilege, with the sole exception of Wyoming, which has not considered the issue. *See Miller v. United States*, No. 04-1507, Pet. for Writ of Cert., at 23-24, n.21 & 22 (collecting state statutes and cases establishing a reporter's privilege). In fact, the concurring opinion of Judge Tatel below recognized "that forty-nine states plus the District of Columbia offer at least qualified protection to reporters' sources." *In re Grand Jury Subpoena* (*Miller*), 397 F.3d at 993 (Tatel, J., concurring).

As Judge Tatel observed, "Denial of the privilege, then, would . . . buck the clear policy of virtually all the states," and, "[i]nsofar as *Branzburg* relied on the 'great weight of authority' to discern the First Amendment's meaning, the shift in favor of the privilege since that time — from seventeen states with statutory privileges then to thirty-one plus D.C. today, with another eighteen providing common law protection — could provide a basis for rethinking *Branzburg*." *Id.* at 993, 994 (Tatel, J., concurring).

Indeed, earlier this term, this Court did just that in an Eighth Amendment case, reconsidering and reinterpreting the constitutional prohibition against "cruel and unusual punishment" with far less consensus among the states. *See Roper v. Simmons*, 125 S. Ct. 1183, 1192 (March 1, 2005) (reinterpreting the Eighth Amendment to bar imposing capital punishment on juveniles after finding that 30 states prohibit the juvenile death penalty); *see also Atkins v. Virginia* 536 U.S. 304, 306-07 (2002) (also reinterpreting the Eighth Amendment to bar the execution of the mentally retarded after finding that 30 states had rejected the practice).

Even if it were true in 1972 "that the great weight of authority [wa]s that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation," *Branzburg*, 408 U.S. at 685, the same is no longer true in 2005. It is quite the opposite. In more than three decades since this Court decided *Branzburg*, it has become the all but unanimous position of the states that newsgatherers should enjoy protection for their confidential sources against compelled disclosure in legal proceedings. This national consensus among the states developed at the same time as this Court granted greater constitutional protection to speech of all kinds, requiring that even generally-applicable laws survive heightened scrutiny when they burden asserted First Amendment interests. *See, e.g., Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994). Moreover, over the same time period, this Court has been extraordinarily careful to ensure that government does not interfere with the gathering, communication, and dissemination of truthful speech and information, such as the very reporting and publishing targeted by the subpoenas in these cases. *See generally Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

This national consensus among the states along with the steady and consistent development and extension of robust

First Amendment protections leads to a single conclusion — that newsgatherers are entitled to at least some constitutional protection for their confidential sources. This Court should grant review in these cases to reconsider whether the First Amendment provides that protection consistent with the consensus that has emerged from the states and the advances in this Court's First Amendment jurisprudence.

II. REVIEW IS WARRANTED TO RECONSIDER THE SUBMISSION AND CONSIDERATION OF *EX PARTE* EVIDENCE AGAINST THE REPORTERS

Perhaps the most surprising and objectionable part of the decision below was the court's willingness to uphold the contempt citations against and possible imprisonment of the Petitioners based upon evidence neither they nor their counsel were allowed to examine or afforded the opportunity to rebut. In fact, all three judges below ruled "that if [the reporter's] privilege applies here, it has been overcome," and then explained that "the reasons [were] set forth in the separate opinion of Judge Tatel." *In re Grand Jury Subpoena* (*Miller*), 397 F.3d at 973. But while "the reasons" may have, in fact, been "set forth" in Judge Tatel's concurring opinion, *id.*, any reader — including Petitioners Judith Miller, Matthew Cooper, Time Inc., and their counsel — other than the judges and the Special Counsel would never know because those findings were redacted — all eight pages of them. *See id.* at 1002 (Tatel, J., concurring). Thus, Petitioners not only had to take the word of the court below that the judges did "ensure that the special counsel ha[d] met his burden demonstrating that information is both critical and unobtainable from any other source," but the Petitioners also never had the opportunity to review or rebut the evidence submitted and considered against them. *Id.* Such an *ex parte* procedure not only offends constitutional common sense, but

also fails to meet the most minimal requirements of due process regardless of the countervailing interests at stake.

Notably, a plurality of this Court ruled just last term in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), that even alleged enemy combatants are entitled to greater due process with regard to knowledge of and challenge to the adverse evidence than Petitioners received in both the court below and the district court. Specifically, this Court concluded in *Hamdi*, that an enemy combatant was due, at a minimum, "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," and that "[a]ny process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short." *Id.* at 2648. Indeed, other courts have held that an accused's opportunity to review, challenge, and rebut evidence introduced to "deprive" him of "life, liberty, or property" is fundamental to any minimal due process standard, even when that evidence is classified based on national security concerns. *See, e.g.*, *United States v. Moussaoui*, 382 F.3d 453, 475 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 1670 (March 21, 2005); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468 (D.D.C. Jan. 31, 2005). As a result, in cases like the criminal prosecution of Zacarias Moussaoui, the government has been required to offer either the defendant or his counsel who have proper security clearance the opportunity to examine the evidence submitted against him.

The interests on the side of secrecy in these cases do not come close to the compelling and certain risks raised by the evidence in the enemy combatant and terrorism-related cases that this Court and others have held to be subject to an accused's review, challenge, and rebuttal. Moreover, reports of the Special Counsel's investigation have gone so far as to suggest that it is possible — if not likely — that the disclosure of Valerie Plame's classified identity as a CIA

operative did not violate any criminal laws, meaning the importance of the investigation is comparatively low. *See, e.g.*, Susan Schmidt, *The When and How of Leak Being Probed: Timing of Disclosure of CIA Employee's Name a Factor in Deciding if Law Was Broken*, WASH. POST, Nov. 26, 2004, at A6 (noting "[t]o constitute a violation of the Intelligence Identities Protection Act, a disclosure by a government official must have been deliberate, the person doing it must have known that the CIA officer was a covert agent, and he or she must have known that 'the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States,'" and explaining that "[i]f White House aides directed reporters to information that had already been published by [columnist Robert] Novak, they may not have disclosed classified information").

Given these circumstances, surely the Petitioners were due at least the minimal amount of process that this Court and others have granted to not only American citizens but even foreign enemy combatants. As a result, this Court should grant review in these cases in order to remedy the obvious and egregious constitutional due process errors committed by the court below.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for writs of certiorari.

Respectfully submitted,

REID ALAN COX
Counsel of Record
RENEE L. GIACHINO
CENTER FOR INDIVIDUAL FREEDOM
113 S. Columbus Street,
Suite 310
Alexandria, VA 22314
(703) 535-5836

Counsel for Amicus Curiae
Center for Individual Freedom

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